United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

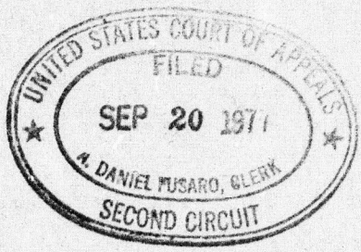
77-7200

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77 - 7200



GERALD L. JOHNSON, CHARLES A. HEMMING, ORION A. LARSON, ROBERT THOMPSON, VIRGIL VALENTINE, individually and as members of the International Organization of Masters, Mates and Pilots of America, AFL-CIO, and the Offshore Division thereof,

Plaintiffs-Appellees

-against-

FRANK T. SCAVO, as President of the International Organization of Masters, Mates and Pilots and as Executive Officer of the Offshore Division,

Defendant-Appellant

B P/S

REPLY
BRIEF ON BEHALF OF
DEFENDANT-APPELLANT

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TABLE OF CONTENTS

PAGE

Statement 1

ARGUMENT:

POINT I -

The briefs submitted in opposition to this appeal concede the basic points established by Scavo..... 2

A) Opposing briefs concede that the law requires the court to evaluate the reasonableness of any constitutional interpretation made by the union's final authority..... 2

B) Opposing briefs cite no rule of law prohibiting a union by its constitution from delegating to its president the authority to interpret its constitution subject to court review of reasonableness..... 4

C) Opposing briefs cite no authority for disregarding the long-standing rule of constitutional interpretation that the specific delegation of authority takes precedence over a general delegation of authority..... 5

D) Opposing briefs cite no basis whatsoever for arguing that membership referenda are inconsistent with union democracy..... 5

POINT II -

Schwartz's attempt to argue alleged facts not in the record is a concession that the record does not support the decision below..... 7

CONCLUSION 10

TABLE OF CASES

	PAGE
Marshall v. International Organization of Masters, Mates and Pilots, F. Supp. , 95 LRRM 3381, 3383 N. 3 (S.D.N.Y. 1977)...	9
Vestal v. Hoffa , 451 F. 2d 706, (6th Cir. 1971) cert. denied 406 U.S. 938 (1972).....	3
Vestal v. Teamsters, 245 F. Supp. 623, (M.D. Tenn. 1965).....	3

STATUTES

Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 et. seq.....	5,6

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STATEMENT

This is a brief by Defendant-Appellant, Frank T. Scavo, as President of the International Organization of Masters, Mates and Pilots and as Executive Officer of the Offshore Division ("Scavo"), in reply to the briefs filed with this Court in the month of September 1977 by the Plaintiffs-Appellees and by Marvin Schwartz.

POINT I

THE BRIEFS SUBMITTED IN OPPOSITION TO THIS APPEAL CONCEDE THE BASIC POINTS ESTABLISHED BY SCAVO.

Scavo's brief established that

1) The International Constitution authorizes the International President to submit referenda for a vote by the membership of the Offshore Division.

2) This authority can only be restricted by amendment of the International Constitution.

3) No amendment ever occurred.

The briefs submitted in opposition to this appeal are compelled to controvert these principals in order to prevail. Not only do they fail to do so but, in fact, those briefs concede the core of Scavo's presentation. Thus:

A. OPPOSING BRIEFS CONCEDE THAT THE LAW REQUIRES THE COURT TO EVALUATE THE REASONABLENESS OF ANY CONSTITUTIONAL INTERPRETATION MADE BY THE UNION'S FINAL AUTHORITY.

The Schwartz brief* concedes that it is appropriate and necessary for a Court to evaluate the reasonableness of any Constitutional interpretation made by the authority within the Union empowered to render such interpretations.** See Schwartz

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* It is to be noted that Schwartz's application to amend the caption of this case by adding the International and the Offshore Division as Appellees was denied by this Court on August 31, 1977. An earlier application to Mr. Fensterstock, Staff Counsel for this Court by Schwartz to change the caption to eliminate Scavo's representative capacity as President of International and as Executive Officer of the Offshore Division was apparently withdrawn by Schwartz. Schwartz has made no motion either before the District Court or before this Court to intervene in these proceedings.

** It is also conceded that the Court must determine from the

brief, pages 28-29; Vestal v. Teamsters, 245 F. Supp. 623 (M.D. Tenn. 1965).

As has been established, there is no other reasonable interpretation of Article VI, Section 1(i) which provides that the President is authorized to "direct that a referendum vote... be held by the membership of any subordinate body on any matter, issue or proposition when he believes that the welfare of the membership of the subordinate body will be protected or enhanced by such action" than that the President has the right to initiate a referendum of members of the Offshore Division when he believes the best interests of the membership will be served by such referendum. Attempts by Schwartz to provide other meanings to Article VI, Section 1(i) are totally inconsistent with the clear language of that section and are completely unpersuasive. It is clear, as a matter of law, that the only reasonable interpretation of Article VI, Section 1(i) is that it means what it says and that the members of a subordinate body may determine matters of concern for themselves through the referendum process where the President believes their interests will be served by following their dictates rather than the dictates of a handful

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International Constitution itself who is empowered to interpret the Constitution (Schwartz Brief, pages 28-29; Vestal v. Hoffa, 451 F. 2d. 706 (6th Cir. 1971), cert. denied 406 U.S. 938 (1972). Here, the International Constitution vests such power in the President. See Article VI, Section 1(d).

of their representatives.

B. OPPOSING BRIEFS CITE NO RULE OF LAW PROHIBITING A UNION BY ITS CONSTITUTION FROM DELEGATING TO ITS PRESIDENT THE AUTHORITY TO INTERPRET ITS CONSTITUTION SUBJECT TO COURT REVIEW OF REASONABLENESS.

Among the fifty-eight pages of his brief, Schwartz does not point to one court decision that prohibits a union from delegating to its president the constitutional authority to interpret the union constitution, subject, of course, to court review of the reasonablenes such a decision. In adopting the present Constitution, the union membership vested specific authority in the International President to interpret the International Constitution (Article VI, Section 1(d)). There is no such grant of authority to any other body within the International be it the International Convention or the General Executive Board. Opposing briefs cite no case or statute to establish the principle that the function of interpretating a union constitution must as a matter of law be delegated to the International Convention or to the General Executive Board. In fact any such rule would violate the long established and essential principle of non-interference in union internal affairs.

C. OPPOSING BRIEFS CITE NO AUTHORITY FOR DISREGARDING THE LONG-STANDING RULE OF CONSTITUTIONAL INTERPRETATION THAT THE SPECIFIC DELEGATION OF AUTHORITY TAKES PRECEDENCE OVER A GENERAL DELEGATION OF AUTHORITY.

Article VI, Section 1(i) specifically delegates to the President the authority to initiate a referendum. This is not disputed in opposing briefs. Opposing briefs cite no section of the Constitution which specifically takes away this authority. Opposing briefs cite no cases which dispute in any way the cases cited in Scavo's Brief for the proposition that specific grants of authority take precedence over general grants and that the power of the executive cannot be limited by legislation enacted under general authority. (Scavo Brief, pp. 10-12; 18-19; 24 and cases cited therein). Schwartz relies solely on his own circular logic in attempting to reconcile irreconcilable constitutional provisions. (Schwartz brief pages 54-55). In no way does he dispute the principles of interpretation which this Court is required to follow as established in Scavo's Brief.

D. OPPOSING BRIEFS CITE NO BASIS WHATSOEVER FOR ARGUING THAT MEMBERSHIP REFERENDA ARE INCONSISTENT WITH UNION DEMOCRACY.

One of the most basic forms of union democracy is achieved when union members have a direct voice in the level of dues they are required to pay to their organization. See e.g. Labor-Management Reporting and Disclosure Act 29 U.S.C. 401, 411 (a)(3).

Opposing counsel go to great lengths to argue that it is undemocratic to permit the International President to submit referendum affecting union dues for approval by the membership of the Offshore Division. They argue that to grant such power to the International President would, in effect, be authorizing the creation of an autocracy. The logic of their argument is incredible. The only consequence of permitting the International President to submit a referendum to the membership of the Offshore Division is the democratic goal of allowing union members to vote upon issues deemed important to their well-being as members of an organization. The encouragement of liberal use of the power of the ballot is not a hallmark of an autocracy but rather is a hallmark of a sound constitutional democracy.

The Tabak brief concedes that the essential purpose of the Labor Management Reporting and Disclosure Act is to broaden and not constrict democratic safeguards for union members (Tabak Brief, p. 9). Denying the President the right to submit a referendum to a vote of the membership of the Offshore Division decreases union democracy. To call referenda voting undemocratic is as logical as claiming that wisdom and compassion are inconsistent with justice.

POINT II

SCHWARTZ'S ATTEMPT TO ARGUE ALLEGED FACTS NOT IN THE RECORD IS A CONCESSION THAT THE RECORD DOES NOT SUPPORT THE DECISION BELOW

Schwartz devotes sixteen pages of his brief in an attempt to present to the Court ab initio alleged facts never before the Court below. Thus, there is but one record citation contained within these sixteen pages except for incidental references to the opinion below. Moreover, the one record citation used in no way substantiates the proposition for which it is cited. Thus, Schwartz states "From the beginning, the Defendant Scavo viewed the Petition with strong disfavor (JA 104)." (Schwartz Brief, p. 10). At page 104 Joint Appendix Mr. Cohen concedes that although the President was against Proposition No. 1, he insisted that the membership be able to decide the issue for itself. The clear implication of the Schwartz statement is that the President opposed the petition process and sought to prevent the membership from determining the issue raised by the petition. In fact, the record establishes that the President strongly supported the petition process and the right of the membership to determine the issue for itself, but that he believed there were better ways of accomplishing the objectives of the petitioners and that he had a duty to offer alternatives to the membership (JA 104-105). The issue of whether the President prefered one alternative or another is

significant only if the President attempted in any way to prevent either alternative from being voted upon by the membership. The record is clear that the President not only permitted both alternatives to go before the membership, but, in fact, required it. Thus, the implication which Schwartz seeks to make, that the President was preventing action upon Proposition No. 1 is totally distorted and missleading. As to the balance of Schwartz's so-called "Statement of Facts" which is totally without record citation, these alleged facts were never before the court below, and thus, even if true, could not be used at this time to buttress the decision below.

In reality, the alleged facts are riddled with untruths, misstatements, distortions, half-truths, and irrelevancies. An illustration may be sufficient to give this Court an insight into this aspect of Schwartz's brief. Schwartz states on page 10 that it was Scavo's decision to submit to the Offshore Division membership Proposition No. 1 and Proposition No. 2 on the same ballot. The record establishes that Scavo had wished to send both propositions out separately, but the American Arbitration Association, the impartial ballot agency, refused to do so on the grounds that submitting two such separate resolutions would cause chaos and confusion in the minds of the membership (JA 30). Instead, the general counsel of the American Arbitration

Association ruled that the propositions should be submitted to the membership on one ballot with an either/or vote. (JA 43-44) The ballot positions were determined by a drawing of lots at the American Arbitration Association (JA 46).*

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* Most of Schwartz's alleged facts cannot be disputed on the record since the issues never arose in the court below. Thus, for example, Schwartz claims at page 10 that Scavo was "acting strictly on his own, he attempted to fire Schwartz." The fact is that in July of 1975 the Offshore Division Executive Council requested Scavo to hire independent counsel for the Offshore Divison instead of utilizing the services of Schwartz who was International Counsel. In this connection, see, Footnote 3 in Marshall v. International Organization of Masters, Mates and Pilots, F. Supp. , 95 LRRM 3381, 3383 N. 3 (S.D.N.Y. 1977).

CONCLUSION

It is now clear that the opposing briefs are totally unable to substantiate with any authority whatsoever the interpretation that Article VI, Section 1(i) does not permit the President to initiate a referendum by members of the Offshore Division concerning the dues structure and the nature of expenses to be incurred and savings to be effectuated when he believes that it is in the best interest of the membership for such a referendum to be conducted. Scavo is confident that this Court will read the clear language of the International Constitution and determine that any other interpretation is an unreasonable deprivation of the basic right of the membership of a subordinate body to determine for themselves by referendum an issue of vital concern to the protection of their livelihood.

Respectfully submitted

Jaffe Cohen Crystal & Mintz

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Ernest Allen Cohen
Allen B. Breslow
of Counsel

Dated: New York, New York
September 20, 1977

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ALLEN B. BRESLOW, being duly sworn, deposes and says: I am not a party to the within proceeding, am over the age of 18 years and reside at Old Bethpage, New York.

On September 20, 1977, I served two (2) copies of the within reply brief upon:

TABAK STEINMAN & MELLUSI
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MARVIN SCHWARTZ
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New York, New York

by mailing two (2) copies of same in a sealed self-addressed postpaid wrapper, addressed as indicated above to said attorneys at their office.

Sworn to before me this
20th day of September, 1977

Allen B. Breslow
ALLEN B. BRESLOW

JAMES P. [illegible]
Notary Public, State [illegible]
No. 60-4[illegible]
Qualified in Westchester [illegible]
Commission Expires [illegible]